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No. 1117

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

J. H. KASISHKE, CORALENA OIL COMPANY, a Delaware Corporation, and OLIVE DRILLING COMPANY, an Oklahoma Corporation,

Petitioners,

vs.

B. A. BAKER,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

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STATUTES

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

Petitioners, A. H. Kasishke, Coralena Oil Company, a Delaware corporation, and Olive Drilling Company, an Oklahoma corporation, respectfully pray that a Writ of Certiorari issue to review the decision and judgment in the United States Circuit Court of Appeals for the Tenth Circuit entered December 18, 1944, affirming the judgment of the District Court of the United States for the Northern District of Oklahoma, entered May 13, 1944, adjudging

that B. A. Baker, respondent, recover of petitioners, an undivided one-tenth interest in all leases, leasehold interests and leasehold estates acquired by petitioners through June 5, 1939, directing petitioners to convey such undivided interest to respondent, and decreeing an accounting for the purpose of determining the amount to be recovered by respondent under the judgment.

The Opinions Below

The District Court of the United States for the Northern District of Oklahoma filed no opinion. Its findings of fact and conclusions of law appear in the record at pages 59 through 70.

The opinion of the United States Circuit Court of Appeals (R. 333-338) was entered on December 18, 1944, and is reported in 146 F. 2d 113.

Jurisdiction

The opinion and decision of the United States Circuit Court of Appeals was entered on December 18, 1944 (R. 333-338). A Petition for Rehearing was timely filed on January 15, 1945 (R. 343, 340). This Petition for Rehearing was considered and denied by the United States Circuit Court of Appeals on January 29, 1945 (R. 361). The jurisdiction of this Court is invoked under Section 240 of the Judicial Code as amended by the Act of February 13, 1925.

Summary Statement

This case presents for correction errors of the District Court of the United States for the Northern District of Oklahoma, erroneously affirmed by the United States Circuit Court of Appeals and involves a flat refusal by the courts below to follow the controlling statutes and decisions of Oklahoma. The case is one of great importance to the

entire oil and gas industry in the Tenth Circuit and may have important effects in that industry outside of the Tenth Circuit because of the far reaching effects of the decisions below.

The oil industry is the largest single business carried on in Oklahoma and Kansas, and has lately become probably the leading industry of New Mexico. All three of these States are in the Tenth Circuit.

We say the decisions below were rendered in utter disregard of both the statutory and case law of Oklahoma controlling the alleged cause of action asserted by the respondent Baker.

The action here involved is one involving a *joint adventure* based upon an *oral* contract to recover a one-tenth interest in numerous producing oil and gas properties owned by the respondent corporations, as well as the profits earned by such interest. The properties involved, exclusive of profits earned in the past, of petitioner, Coralena Oil Company, alone, are valued at Six Million Dollars (R. 63).

Joint adventures have been numerous in the oil industry, and have been the subject of many actions at law and in equity in the courts of Oklahoma over many years. Out of these numerous controversies, by the year 1937, the law of Oklahoma had become crystallized into a set of basic principles which the Supreme Court of Oklahoma, in that year, adopted as controlling all litigation thereafter arising in that State pertaining to joint adventures, particularly in the oil industry. Because of the vast amount of litigation that had arisen concerning joint ventures and partnerships in Oklahoma, the legislature had passed certain limiting statutes which will be hereafter discussed, controlling the application of the law to partnerships and joint adventures doing business in Oklahoma. Moreover, the Supreme Court of Oklahoma has taken the positive stand that it is a legal

impossibility for a majority stockholder by virtue of his stock ownership to gain legal control over a corporation. The Supreme Court of Oklahoma has also held that agreements for the conveyance of an interest in mineral leasehold estates in Oklahoma are within the statute of frauds and to be enforced must be in writing.

We will demonstrate hereinafter that the District Court and the Court of Appeals below refused to follow the law of Oklahoma as laid down in the statutes of Oklahoma and by the decisions of the highest Court of the State of Oklahoma controlling this case in flagrant violation of the rule laid down by this Court in *Erie R. Co.* v. *Tompkins,* 304 U. S. 64, and the cases following it.

In 1929, A. H. Kasishke, Incorporated, an Oklahoma corporation, was engaged in the rig building and lumber business. Respondent was a stockholder, Secretary-Treasurer and a member of the Board of Directors of that corporation. The corporate records, prepared by respondent, disclosed that in consideration of the performance of personal services on respondent's part, he received from the corporation a certain salary and a 10% bonus from the profits of the company (R. 139-141). Petitioner, A. H. Kasishke, was the President of that corporation and the owner of one-half of its capital stock, and Olive Kasishke, his wife, was the owner of the other half of the stock, with respondent Baker holding a qualifying share. In 1932 it was decided that A. H. Kasishke, Inc., would go out of the rig building business and thereafter engage in the general oil business.

In 1932, the corporate records disclose that respondent was employed by the corporation at a stated salary. There is nothing in the record of that corporation which shows or even indicates that the respondent was to receive any interest in the profits earned by the corporation after it engaged in the oil business. Respondent remained Secre-

tary-Treasurer of the corporation, continued to hold his qualifying share of stock and continued as a member of the Board of Directors. Respondent prepared all minutes and resolutions reflecting the arrangements between the corporation and respondent.

Petitioner, A. H. Kasishke, advanced $300,000 to the corporation to enable it to engage in the general oil business. Respondent advanced no capital for the new venture. At the time the corporation went into the oil business, it owned no producing oil and gas leases.

Thereafter, the corporation known as A. H. Kasishke, Inc., was dissolved and the Coralena Oil Company of Oklahoma was formed. Later, this corporation became the Coralena Oil Company of Delaware. Subsequently, the Olive Drilling Company, an Oklahoma corporation, was organized. Respondent was issued a qualifying share or shares of stock in each of these corporations and served as Secretary-Treasurer and as a member of the Board of Directors of each of them.

From year to year, resolutions of the various Boards of Directors of the respective corporations, in clear and no uncertain terms, stated the exact salary and compensation which respondent should receive in payment of the services he rendered these corporations. Such records were prepared by respondent.

A. H. Kasishke, Inc., and the various corporations subsequently organized, acquired many oil and gas leases in Oklahoma and Kansas proving to be of enormous value. Thus, the District Court found that the leases of petitioner, Coralena Oil Company, alone were worth Six Million Dollars (R. 63). During the years of the development of the oil properties, from 1932 to 1939, respondent worked as an employee of the various corporations, and in each instant at a stated salary. Such records during all these years were

prepared by or under the direction of respondent. In 1939, a controversy arose between petitioner, Kasishke, and respondent, Baker. In June of 1939, respondent Baker was then employed by the Olive Drilling Company at a stated salary and was Secretary-Treasurer of that corporation. As a result of the controversy between petitioner, Kasishke, and respondent Baker, Baker voluntarily resigned his position with petitioner, Olive Drilling Company. This resignation is contained in a letter dated June 5th, 1939 (R. 33). The letter gives as a reason for the resignation, the attitude of the petitioner, Kasishke. The letter asserts no claim of any character whatsoever against any of petitioners, asserts no breach against Kasishke and is consistent only with the resignation of an *employee* from his job.[1]

From June 5, 1939, when respondent resigned, until May 26, 1942, respondent asserted no claim orally or in writing against petitioners of any kind or character, or for any interest in any of the producing properties of petitioner corporations.

On May 26, 1942, respondent filed this action in the District Court for the Northern District of Oklahoma, claiming that in the year 1932 he had an oral contract with petitioner, Kasishke, *individually*, wherein it was agreed that respondent should have an undivided one-tenth interest in all leases obtained by the corporation, A. H. Kasishke, Inc., after petitioner, Kasishke, had been paid back the money he had advanced and after the properties had been fully paid out. In support of this allegation, respondent's entire testimony was as follows (R. 98, 99, 116):

> "A. Well, up to that time I had been getting ten per cent of the profits of the rig building business to be

[1] The only claim respondent asserted against any of petitioners, after his resignation and prior to this action was *for three days pay* (R. 65).

computed at the end of the year, and we started into the venture of oil business, and during the conversation in the fall of 1932 with Mr. Kasishke he brought up the question of turning the rig building business over to the Dean Rig Construction Company. We were in the process of drilling a well and making some other deals, and during this conversation he said, now if we should turn that over to the Dean Rig Construction Company he said your deal is going to be different, it will have to be different, in that if we got into the oil business and you devote your time to the oil business, look after the office and general routine of work, and with your experience, you will have to wait until I get my money back and the properties pay out before you can share in anything, and he says you will get one-tenth; you cannot get it until the properties pay out; and I said, that is all right, Al, I am not worried about that.

Q. No distinct difference, no change was made anyhow in any other respect from the contract that you had about the profits?

A. Mr. Kasishke told me, you understand if you go into this oil business it will have to be different so far as you are concerned. I had been drawing ten per cent of the profits of the rig business, but in that we are going into the oil business it was going to be necessary for him to place money in there to develop and drill these wells, if and when we drilled them, and he said, you understand you cannot expect to draw any profits, you cannot expect to draw anything until the properties are paid out and I have got my money out of them, then you share in a ten per cent interest. That was about the substance of the conversation.

Q. How did that come up, if you remember?

A. I don't remember just how it came up other than Al was sitting on a divan, in fact lying down; he just raised up and said, you understand our deal; I said, yes, I thought I did; he said, you understand you don't get anything out of this until I get my money out of this and the properties pay out, and I said, yes; and he said, that is all I want to know, I just want to know you

understood it. That was around the first of December."

Respondent did not contend that the properties had paid out on June 5, 1939, the date of his resignation, but did contend that they had paid out at the time he filed his action in 1942. Respondent further contended that the conversation had between him and petitioner, Kasishke, created a joint adventure which entitled respondent to participation in the profits earned by a one-tenth undivided interest subsequent to June 5, 1939, the day when respondent admitted and the District Court found (R. 70) that the joint adventure was terminated.

As this so-called joint adventure had no term, it was terminable at the will of either party and no excuse or justification for termination was needed by either party to terminate the venture.

Respondent also contented that petitioner corporations were simply convenient devices by which petitioner, Kasishke, carried on his business, and since the corporations were controlled and dominated by petitioner, Kasishke, the corporate entities should be disregarded.

Petitioners defended on the ground that the oral contract sued upon was never in fact created; that respondent was an employee of the various corporations, working for a stated salary; that these facts were reflected by minutes and resolutions of the Boards of Directors of the petitioner corporations, which records were prepared by respondent as Secretary-Treasurer of each corporation; that respondent, being a stockholder, officer and director of petitioner corporations, was estopped to contend that they did not in fact exist and that their corporate entities should be disregarded, and was further estopped to contend that the business of the various corporations was carried on as a joint adventure; and that even if the alleged conversation between respond-

ent and petitioner, Kasishke, had occurred, it was wholly insufficient *as a matter of law* to establish a joint adventure, and under no theory of law could be used as a basis to support the relief sought by respondent. Further, petitioners contended that the conditions that the properties be paid out and that petitioner, Kasishke, be repaid the money he invested in the oil enterprises, were conditions precedent to the vesting of any interest in respondent, even under respondent's theory of the case. Hence, as respondent failed to prove the fulfillment of such conditions, he was not entitled to recover; that respondent as a matter of law was not entitled to participate in the profits of an alleged joint adventure or partnership after his withdrawal from the arrangement; that the respondent renounced and repudiated the alleged oral contract before the time of performance and therefore performance on petitioner's part was excused; that all obligations remaining to be performed by petitioners on June 5, 1939, when respondent withdrew and resigned, were executory obligations which were extinguished by respondent's renunciation and repudiation of the alleged oral agreement. Petitioners further contended that the alleged oral express contract was void and unenforceable under the Oklahoma statutes of uses trusts and frauds. Petitioners contended that the theory that control of the corporations here involved was obtained through majority stock ownership and personal persuasion is untenable and legally impossible under Oklahoma law.

The District Court disregarded the controlling Oklahoma statutes and decisions of Oklahoma's highest court, and held that an express oral contract existed between respondent and petitioner, Kasishke, and that the petitioner corporations were bound thereby as Kasishke controlled the corporations, which control the District Court held (R. 56) flowed from Kasishke's ownership of a majority of the

shares of stock of petitioner corporations; that the oral contract established a joint adventure under which respondent was entitled to a one-tenth interest in all properties owned by petitioner corporations on June 5, 1939, the date when respondent resigned; that the petitioner should execute assignments conveying to respondent an undivided one-tenth interest in all leasehold estates owned by the petitioner corporations on June 5, 1939, and finally, that respondent was entitled to participate in the profits of the alleged joint adventure *after its termination on June 5, 1939*, and this although the properties involved had not paid out (R. 66). From this judgment of the District Court, petitioners appealed (R. 85). The Circuit Court of Appeals for the Tenth Circuit affirmed (R. 339).

Questions Presented

1. Whether the decisions below have decided important questions of local law in a way probably in conflict with the applicable local law and decisions.

2. Whether the decisions below have not given proper effect to applicable decisions of this Court.

3. Whether under the Oklahoma statutes and decisions, respondent failed to prove a cause of action.

4. Whether respondent is estopped to assert that the alleged oral agreement created a joint adventure.

5. Whether the amended complaint alleges and the proof thereunder of the alleged conversation relied upon by the petitioner establishes, as a matter of Oklahoma law, a joint adventure.

6. Whether respondent can recover under the Oklahoma decisions upon the theory that he had an employment contract with petitioner corporations because of the oral conversations had with petitioner, Kasishke.

7. Whether this is a case under the Oklahoma decisions where the corporate entity may be disregarded.

8. Whether the alleged oral contract is enforceable because of the Oklahoma statute of uses and trusts and the Oklahoma statute of frauds.

9. Whether the evidence was sufficient to support the holdings of the courts below that the legal titles to the leases involved were held in trust by the corporations for the benefit of respondent.

10. Whether the findings of fact adopted by the court are sufficient to support the judgment and decree entered.

11. Whether the conclusions of law made by the District Court and affirmed by the Court of Appeals, are not in conflict with the applicable local statutes and decisions of Oklahoma.

Specification of Errors to Be Urged

1. In denying petitioners' Motions to Dismiss the cause.

2. In holding that the respondent alleged and proved a cause of action.

3. In holding that the respondent was not estopped to assert that the alleged oral agreement involved created a joint venture.

4. In holding that the oral contract relied upon as a matter of law created a joint adventure.

5. In holding that the petitioner corporations were bound by the oral contract allegedly made between petitioner, Kasishke, and respondent.

6. In holding that this was a case under the Oklahoma decisions where the corporate entity might be disregarded.

7. In holding that the oral contract sued upon was sufficient to support the sweeping provisions of the judgment and decree entered.

8. In failing to hold that the oral contract was unenforceable because of the Oklahoma statute of uses and trusts and the Oklahoma statute of frauds.

9. In holding that the evidence was sufficient to support the decision that the legal titles to the leases involved were held in trust by petitioner corporations for the benefit of respondent.

10. In holding the findings of fact were supported by the weight of the evidence and that such findings supported the judgment and decree entered.

11. In making conclusions of law in conflict with applicable local statutes and decisions.

12. In entering judgment for respondent.

Statutes Involved

Section 8116, Oklahoma Compiled Statutes 1921, provides:

> "After a partner has given notice of his renunciation of the partnership, he cannot claim any of its subsequent profits, and his co-partners may proceed to dissolve the partnership."

Section 136, Title 60, Oklahoma Statutes 1941, provides:

> "No trust in relation to real property is valid unless created or declared:
>
> I. By written instrument subscribed by the grantor, or by his agent thereto authorized by writing;
>
> II. By the instrument under which the trustee claims the estate affected; or,
>
> III. By operation of law."

Section 137, Title 60, Oklahoma Statutes 1941, provides:

> "Trusts Presumed, When. When a transfer of real property is made to one person, and the consideration

therefor is paid by or for another, a trust is presumed to result in favor of the person by or for whom such payment is made."

Section 136, Title 15, Oklahoma Statutes 1941, provides:

"The following contracts are invalid, unless the same, or some note or memorandum thereof, be in writing and subscribed by the party to be charged, or by his agent:

* * * * * * *

5. An agreement for the leasing for a longer period than one year, or for the sale of real property, or of an interest therein; and such agreement, if made by an agent of the party sought to be charged, is invalid, unless the authority of the agent be in writing, subscribed by the party sought to be charged."

Reasons for Granting the Writ

Several of the reasons usually advanced for the allowance of a Writ of Certiorari are present in this case. The Circuit Court of Appeals has rendered a decision on important questions of local law in a way probably in conflict with the applicable local statutes and decisions, has not given proper effect to the applicable decisions of this Court, and the questions presented are of such importance that the public interest calls for the exercise of this Court's powers of supervision and correction.

I

Both the District Court and the Circuit Court of Appeals Have Decided Important Questions of Local Law in a Way Probably in Conflict With the Applicable Local Statutes and Decisions.

As we have shown in the Summary Statement, it is of first importance to the many persons, companies and corporations engaged in development and exploitation in the oil

and gas industry in such States as Oklahoma, Kansas and New Mexico, that the rules of law governing partnerships and joint adventures be clear, concise and definite. Practically all newly discovered producing areas in these three States were discovered by persons who were acting as mining partners or as joint adventurers. Of the larger oil fields in Oklahoma, only a few have been discovered by large oil companies.

The State of Oklahoma has found it necessary to make clear and concise rules controlling joint adventures and such rules must be kept clear and concise in order to encourage the development and exploitation of oil in the industry, as we all know that it is of the utmost importance to the Nation to discover new oil reserves because of the great strain that has been placed upon producing oil fields and on our established oil reserves by the tremendous demands of the present global war. Conflict between the State decisions of the Federal courts in these States upon the important questions controlling the operations of partnerships and joint adventures in the oil and gas production field will cause hopeless confusion and a multiplicity of litigation.

We will now demonstrate that the decisions below are in conflict with the applicable statutes and decisions of Oklahoma, and in effect let down the bars to all sorts of suits drawn on the "joint adventure" theory in the Federal courts of Oklahoma, and the Tenth Circuit, which could not be maintained if brought in the Oklahoma State Courts.

(A) A Joint Adventure Was Not Established Because There Was No Argeement Between the Parties to Share Losses

Many decisions have been had over the years in Oklahoma, dealing with partnerships and joint adventures in the oil

industry. In 1937, the Supreme Court of Oklahoma did what it had not done in any of its prior decisions controlling partnerships or joint adventures, in promulgating a positive definition containing the essentials which must always be present before a joint adventure can exist in Oklahoma.

In the case of *White* v. *A. C. Houston Lumber Co.*, 179 Okl. 89, 64 P. (2d) 908, 910, the Supreme Court had before it for decision the question of what were the essentials of a joint adventure in Oklahoma. The Supreme Court of Oklahoma reviewed the numerous decisions of that court dealing with this subject, and then enunciated the following rule controlling joint adventures (p. 910):

> "Each case of mining partnership or joint adventure must necessarily be determined by its own facts. However, by examination of cases heretofore decided by this court, *we can devise a test consisting of three requirements which must always be present in order to form the relationship;* (1) There must be joint interest in the property by the parties sought to be held as partners; (2) *there must be agreements,* express or implied, *to share* in the profits *and losses* of the venture and (3) there must be actions and conduct showing co-operation in the project." (Citing fifteen Oklahomas decisions.) (Italics supplied)

Since the decision of the Supreme Court in the *White* case, all cases in the Supreme Court of Oklahoma concerning joint adventures and partnerships have followed the rule of the *White* case. The latest case, *Conley Drilling Co.* v. *Rogers*, 191 Okl. 667, 132 P. (2d) 959, 961, was decided by the Supreme Court of Oklahoma in 1943. The *Conley Drilling Co.* case squarely holds that it is essential to the existence of a joint adventure that the parties agree to share losses. The rule of the court on this question is stated con-

cisely in the third paragraph of the syllabus of the case, which reads (p. 959):

> "Generally before a mining partnership can exist, there *must be a joint interest* in the property, *an agreement* express or implied to develop it, *and to share in the profits and losses* incident to the venture, and conduct showing a cooperation between the parties in the venture." (Italics supplied)

Measured by the rule of the *White* and *Conley Drilling Co.* cases, the Amended Complaint fails to state a cause of action for the reason that it fails to allege any agreement between Baker and Kasishke to the effect that Baker should share the losses of the venture. For this reason, it was error for the District Court to overrule petitioner's Motion to Dismiss the Amended Complaint. In testifying on this vital aspect of the case, Baker said that it was agreed that he was *not* to share in any losses of the venture (R. 145). Thus, the proof likewise failed to show a cause of action and establish a joint venture under the rule announced in the *White* and *Conley Drilling Co.* cases. It is submitted that the decisions below are in direct conflict with the law of Oklahoma as laid down in the *White* and *Conley Drilling Co.* cases. The decision below pays "lip service" to the rule that joint adventurers must agree to share losses (R. 337), but then holds that it is not absolutely necessary that there be participation in both profits and losses, citing (R. 337) *E. D. Bedwell Coal Co. v. State Ind. Comm.* (Okl.), 11 P. (2d) 527. We say that the rulings in the *White* and *Conley Drilling Co.* cases have definitely established as the controlling Oklahoma law that there *must* be an agreement to share *both* profits *and losses*, and therefore these later decisions clearly supercede the *E. D. Bedwell Coal Co.* case.

Here the record is clear and there is no conflict because no agreement to share losses was alleged by respondent and he testified as follows (R. 145):

"Q. You were not to take a dime of loss, is that true? A. That is true."

Hence it is specious to argue as the court does below (R. 337) that an agreement to share losses might be implied because Baker worked for a "nominal"[2] salary.

(B) Respondent Had No Joint Interest in the Properties or in the Profits of the Enteprise and his Interest Was Contingent, Therefore No Joint Adventure Was Established

The case of *White* v. *A. C. Houston Lumber Co.*, supra, holds among the requisites required for a joint venture, that there must be a joint interest in the property involved and necessarily in the profits of the venture. The pleadings, the proof, the findings of the District Court and the judgment of that court all show plainly that it was respondent's theory that he was to have no interest in the physical properties described, or in the profits earned, until and unless Kasishke was repaid the money he had advanced, and until the properties were substantially drilled, developed and fully paid out. This theory necessarily means that respondent had no joint interest in the property except upon the happening of these contingencies. In such a situation, we submit the case of *Carson* v. *Waller*, 127 Okl. 186, 260 Pac. 72, is controlling. There, the Supreme Court of Oklahoma had before it for consideration the provisions of a contract which it was urged created a min-

[2] Such "nominal" salary when Baker resigned was $300 per month (R. 136)!

ing partnership or joint adventure because the contract provided as follows:

> "Should said well become a commercial well, it is agreed that party of the second part shall pay his proportionate one-fourth part of the further development and operating expenses of said lease, and if casing is set in said well he shall pay his proportionate one-fourth part of the expenses of such casing; all future development or operating expenses to be determined by a majority of the interests owned and held in said leasehold estate; all oil and gas runs accruing to the interest of the party of the second part shall be by appropriate division order assigned to parties of the first part for an indebtedness remaining unpaid at any time chargeable to the interest of the party of the second part."

In construing the provisions of the contract in the *Carson* case, which are substantially to the same effect as the provisions of the alleged oral understanding in the instant case, the Supreme Court of Oklahoma held:

> "It is contended that this paragraph of the contract is sufficient, in itself, to create a partnership between the parties thereto. This contention has been decided adversely to the claim of the plaintiffs, by this court, in the following cases: *Gillespie* v. *Shufflin*, 91 Okl. 72, 216 P. 132; *Wammack, et al.*, v. *Jones*, 103 Okl. 1, 229 P. 159; *Ellis, et al.*, v. *Lewis, et al.*, 119 Okl. 201, 249 P. 295; *Ash* v. *Mickleson*, 118 Okl. 163, 247 P. 680.

In the last-cited case, the court holds as follows:

> 'A mining partnership or a joint adventure cannot exist, unless there is a co-operation among the parties in the development of a lease for oil and gas, each agreeing to pay his part of the expenses and to share in the profits and losses. * * *
> "Where it is the intention of the parties that a partnership is to become effective *upon the happening of a certain contingency*, or is to take effect at *a fu-*

ture date, the relation of partners does *not* exist.' (Italics supplied.)

The *Carson* case has been cited with approval by the Supreme Court of Oklahoma on numerous occasions since it was written in 1937. It is plain under respondent's theory that, if the properties here involved did not produce sufficient oil to pay out, and if the properties did not produce sufficiently to pay Kasishke for the amounts advanced by him, and if the properties were not substantially developed because of any justifiable reason, Baker, under his alleged agreement obtained no interest in the physical properties and no interest in the profits. Therefore, Baker never became a joint adventurer.

The decisions below clearly conflict with the rule of the *Carson* case and the cases cited therein.

(C) Respondent Failed to Establish a Joint Adventure Because the Evidence Showed That He Had no Equal Right of Management

It was respondent's contention that all of the properties from which any profits could possibly be derived or were to be derived were to be owned and managed by a corporation in which respondent was to own one share of stock and in which he was to be an officer and director.

A. H. Kasishke, Inc., the original corporate entity through which the respondent says the joint adventure was to be operated, was organized under the laws of the State of Oklahoma. Section 104, Title 18, Oklahoma Statutes, 1941, provides that the corporate powers, business and property of all corporations formed under the chapter must be exercised, conducted and controlled by a Board of Directors.

Under the very agreement upon which respondent relies, he had no right to manage or control the property or business of the corporate enterprises. That seems plain.

It has long been settled law in Oklahoma, that the right of management should be used as a test for distinguishing between joint adventures and other employment contracts and relationships. Thus, in the case of *Municipal Paving Co.* v. *Herring*, 50 Okl. 470, 150 Pac. 1067, 1070, the question was presented whether a written contract constituted a partnership (or joint adventure) or an employment contract. The Supreme Court of Oklahoma in the course of its opinion commented at length upon the fact that the written contract showed that the plaintiff there involved had no voice in the management of the business, and held (p. 1070):

> "The plaintiff, under the terms of the contract, had no voice in the management of the business, except in a minor capacity at the mines, and this even was under the direction of the company. The contract did not give him the right to bind the company or the property as a member of a partnership may bind the firm and the firm property.
>
> * * * * * * *
>
> So the contract, measured by every test, falls short in each instance of fulfilling the requirements of a partnership agreement."

Other decisions throughout the United States have followed the rule of the *Municipal Paving Co.* case.[3]

Under this point, it is also important to note that the respondent had no *joint* interest in the profits. Even under his theory of the case his future interest at best was but a common interest in such profits and he had no disposition and control over such profits. The *Municipal Paving*

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[3] *DeRees* v. *Costaguta*, 275 Fed. 172; *First National Bank of Eugene* v. *Williams* (Ore.) 20 P. 2d 222; *Hanthorn* v. *Quinn*, 42 Ore. 1, 69 P. 817; *Cong* v. *Toy*, 85 Ore. 209, 166 P. 50; *Worden Co.*, v. *Beals and Bennet*, 120 Ore. 66, 250 P. 375; *Beck* v. *Cagle* (Cal.) 115 P. 2d 613; *Coral Gables Surety Corp.* (Fla.) 166 So. 555; *Rae* v. *Cameron* (Mont.) 114 P. 2d 1060; *Dameron* v. *Zilch* (R. I.) 186 Atl. 21; *Spier* v. *Lang* (Cal.) 53 P. 2d 13

Co. case, supra, held that in a situation as that involved in the case at bar, a partnership or joint adventure does not arise. Thus, the Supreme Court held in the *Municipal Paving Co.* case (p. 1070):

> "If the interest in the profits is joint, then that generally makes it a partnership, but a common interest in the profit does not. If the interest in the profits is that of an owner, if there be a joint seizure, if the parties each have the right, as such owners, to dispose of the profits, then there is a partnership. If one may dispose of or control the profits as much as the other, then there is a joint interest, but if the plaintiff's interest be only a common interest in the profits, that is, if he have no title jointly with the company with the right to control as owner over the profits, but with only a common interest in them because the profits measure what amount he shall receive from the asphalt taken from his mine, then he is not a partner. *Sankey* v. *Iron Works*, 44 Ga. 228. The contract itself does not say that the plaintiff shall share in the losses, and from an examination of the same it is manifest that the plaintiff had no seizure of its profits, and had no more control thereof than a stranger to the contract. The defendant company retained absolute control and possession over the entire business, the plaintiff had no legal or equitable right in the profits as profits, but only a contractual right to have his share paid over to him by the company, when earned, and we think in this contract the company simply contracted to pay the plaintiff a certain part of the profits, if any were made, as payment for the asphalt mined from plaintiff's lease. That this conclusion is true is apparent from the fact that no other provision was made in the contract for remunerating the plaintiff for the asphalt other than his sharing in the profits."

It is important in construing this rule to bear in mind the first and third provisions of the rule announced by the Supreme Court of Oklahoma in *White* v. *A. C. Houston*

Lumber Co., supra,[4] which provisions of the rule must be present before a joint adventure can be decreed. It is readily seen that these requisites of joint interest and cooperation in the project were absent in both allegations and proof in the present case; hence, under the Oklahoma decisions it was erroneous for the courts below to hold a joint venture had been established.

(D) A Joint Adventure Must be Limited to a Specific Venture

The respondent, even under his theory of the case, would have only a contract under which he might become a joint adventurer upon the happenings of certain contingencies which never occurred. It was respondent's theory that he entered into an agreement with petitioner, Kasishke, under the terms of which they engaged in a general oil business and this is the broad and unlimited nature of the alleged agreement found by the District Court (R. 61). This agreement was not for the purpose of developing any specific or particular property, or for engaging in any single enterprise, but was a broad arrangement to engage in the general oil business in all of its aspects.

The Supreme Court of Oklahoma has held many times that a joint adventure is a special combination of two or more persons seeking jointly, without any actual partnership *or corporate designation,*[5] a profit in some specific venture.

Smith v. *Burke,* 150 Okl. 34, 300 Pac. 748.

Twyford v. *Sonken-Galamba Corporation,* 177 Okl. 486, 60 P. (2d) 1050.

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[4] 179 Okl. 89, 64 P. (2d) 908, 910. The first requirement of the rule is that there must be joint ownership in the property by the parties and the third requirement is that there must be actions and conduct showing cooperation in the project.

[5] As respondent conceded that the "venture" was to be conducted *as a corporation,* it could not be a joint adventure.

Coryell v. *Marrs*, 180 Okl. 394, 70 P. (2d) 478.
Commercial Lumber Co. v. *Nelson*, 181 Okl. 122, 72 P. (2d) 829.
Sand Springs Home v. *Dail*, 187 Okl. 431, 103 Pac. 524.

Certainly, the oil business is not a single and specific venture and hence the arrangement contended for by respondent could not be a joint adventure under the definitions thereof prevailing in Oklahoma.

(E) This is Not a Case in Which the Corporate Entity May be Disregarded

Corporations exist as entities apart from their stockholders. The oil properties in which respondent claimed an interest were all owned by petitioner corporations, not petitioner, Kasishke. Accordingly, for respondent to reach such properties he would have had to establish an agreement with the corporations creating such interest or the corporate entities of the petitioner corporations would have to be disregarded. Respondent sought to have the corporate entities of petitioners disregarded on the theory that petitioner Kasishke as the owner of the majority stock of the various corporations thereby controlled the corporations. The undisputed facts in the case are that Mrs. Kasishke,[6] wife of the petitioner, Kasishke, was the owner of 50% of the stock of petitioner corporations. In 1938, she was the owner of 2200 shares of stock, which according to petitioner represented 50% of the outstanding stock. The remaining stock, less qualifying shares, was owned by Mr. Kasishke. The record shows that Mrs. Kashishke participated in the affairs of the company as a director and as a stockholder. Respondent himself was an officer and director

[6] Mrs. Kasishke is not a party to this case.

of the petitioner corporations. Respondent actually prepared the minutes of petitioner corporations during the period in controversy. Such control as was exercised by petitioner Kasishke is insufficient to warrant disregard of the corporate entity. The present law on this point is clearly stated by the Supreme Court of Oklahoma in the latest case on this subject, *State, ex rel* v. *Tulsa Flower Exchange*, 135 P. (2d) 46, 47:

> "The word 'control' should be accorded its full and complete meaning, with due regard to the general purpose for which it was used in the statute. The statute in no way limits its meaning. The word as there used should be held to mean full power and authority to manage and direct every act, and to formulate every business policy, of the employment unit, without right of legal interference from anyone with respect to all lawful pursuits.
>
> The owner or owners of the majority of the capital stock of a corporation can never have direct control of the corporation merely by reason of such ownership. Direct control is always in the board of directors. 18 O. S. 1941, Sec. 104. The majority stockholders may name the board of directors and thereby exercise a more or less indirect control. The board of directors can never be composed of less than three stockholders. Sec. 104, supra. *Therefore, it is a legal impossibility for a single individual ever to acquire direct control of a corporation as a business entity.*
>
> This should be sufficient answer to every argument advanced by the state in this particular case. Tinger, by virtue of his majority stock, held certain powerful advantages, and may have exercised certain influences over the other stockholders that would border on something akin to indirect control, but he could never exercise direct control of the corporation by any 'legally enforceable means or otherwise.' Personal influence was the only instrument at his command in dealing with the board of directors concerning control of the corporation. It was said, however, in *Gaines* v. *Gaines*

Bros. Co., 176 Okl. 583, 56 P. (2d) 863, 868, that 'the law has always recognized the right of majority stockholders of a corporation to control its business and affairs.' No authority for the statement was cited. And the statement itself was unfortunate, for our statute, supra, provides otherwise. The majority may exercise indirect control by naming the directors who actually control the corporation." (Italics Supplied).

Thus, it is perfectly plain that the rule in Oklahoma is that it is a legal impossibility for a single individual, by stock ownership or personal persuasion, ever to acquire direct control of a corporation as a business entity. Moreover, respondent received all the benefits that flowed from the incorporation of the petitioner companies. Assuming the facts are as he charges, he has been relieved of all personal liability for corporate debts.[7] Further, he has acted as an officer and director of the various corporations for a period of years, kept the minutes, which minutes reflect in every year the payment of a specific salary to respondent, together with certain additional bonuses paid during certain early years when the profits were high. Having thus dealt with petitioner corporations, received salaries therefrom as an employee and officer of the corporation, respondent should be estopped to assert that the corporate entity no longer exists.[8] In disregarding the corporate entity for

[7] In fact, when respondent, shortly after he resigned, was sued for a corporate claim, he actually defended and escaped personal liability on the assertion that he had *no interest in petitioner corporations* (R. 75, 76, 80).

[8] As we point out in footnote 5 (supra) it is the established law of Oklahoma that co-adventurers are not permitted to carry on a joint adventure under a corporate organization or designation. *Sand Springs Home* v. *Dail*, 187 Okl. 431, 103 P. 524; *Commercial Lumber Co.* v. *Nelson*, 181 Okl. 122, 72 P. 2d 829; *Coryell* v. *Marrs*, 180 Okl. 394; 70 P. 2d 478; *Perry* v. *Morrison*, 118 Okl. 212, 247 P. 1004. This rule is not to be confused with the rule that corporations may be become joint adventurers with others.

the conveniences of respondent, the decisions of the courts below are in direct conflict with the *Tulsa Flower Co.* case.

(F) The Alleged Oral Contract Is Unenforceable Because of the Provisions of the Oklahoma Statute of Uses and Trusts and the Statute of Frauds

Respondent's theory requires, in order to reach the properties of the corporate petitioners, the enforcement of an oral express trust, the subject of which is an interest in real property. Thus because of such *express oral* contract the District Court held petitioner corporations to be trustees of respondent (R. 69).

The Supreme Court of Oklahoma has held that an oil and gas lease is an interest in real estate within the meaning of the Oklahoma statute controlling trusts and frauds.

Aikman v. *Evans*, 181 Okl. 94, 72 P. (2d) 479;
Harris v. *Tucker*, 147 Okl. 210, 296 Pac. 397;
Black v. *Wickett*, 146 Okl. 191, 293 Pac. 782.

Title 15, Section 136, of the Oklahoma Statutes of 1941 specifically provides that the following agreements are invalid unless in writing, and signed by the party or his agent:

> "An agreement for the leasing for a longer period than one year, or for the sale of real property, or of an interest therein, * * *."

Title 60, Section 136 of the Oklahoma Statutes of 1941 provides that no trust in relation to real property is valid, unless created or declared "(1) By a written instrument subscribed by the grantor or by his agent thereto authorized by writing."

There is no contention in the present record that the trust sought to be declared by respondent Baker is either a resulting trust or a trust by operation of law. The respondent's theory is that there was an express agreement creating an

express trust under which the corporate petitioners held title to the oil producing properties in question for the benefit of respondent. The courts below have decreed a trust and have declared that respondent has a one-tenth interest in the titles to the leases (R. 69). To reach such a conclusion, it is necessary to completely ignore the provisions of the Oklahoma statutes prescribing how trusts in real estate shall be created and the Oklahoma decisions construing those statutes. The Supreme Court of Oklahoma has held that an oral agreement which attempts to create an *express* trust, the subject of which is an interest in real property, is unenforceable.

Reed v. *Peck & Hills Furniture Co.*, 93 Okl. 212, 220 Pac. 900;
McCoy v. *McCoy*, 30 Okl. 379, 121 Pac. 176;
Hazlett v. *Keapse*, 171 Okl. 82, 42 Pac. (2d) 124;
Bryant v. *Mahan*, 130 Okl. 67, 264 Pac. 811;
Abramah, et al. v. *McSoud, et al.*, 109 P. (2d) 822;
Cardiff v. *Spradling*, 140 P. (2d) 920;
Oliphant v. *Rogers*, 95 P. (2d) 887.

If it be urged that the oral agreement contended for by respondent does not constitute an attempt to create an oral express trust, nevertheless, under respondent's theory he was to receive a one-tenth interest in the leases in consideration for certain services. Such a contract has been squarely held by the Supreme Court of Oklahoma to be violative of the statute of frauds and unenforceable. Thus, in the case of *Hall* v. *Haer*, 160 Okl. 118, 16 P. (2d) 83, 84, the Supreme Court of Oklahoma held that an oral agreement by the owner of land to convey an undivided one-half interest in the minerals therein to another person, *in consideration of services to be rendered*, is within the statute of frauds and unenforceable. The Supreme Court further held that the mere performance of the services under such parole agree-

ment is not sufficient to take it out of the statute. In the *Hall* case, as here, the plaintiff contended that his agreement created a joint venture or mining partnership and, therefore, the case did not come within the statute of frauds. In ruling adversely to such contention, the Supreme Court of Oklahoma held (p. 84):

> "Plaintiff urges that the agreement merely constitutes a joint adventure or a mining partnership. This contention cannot be sustained. We think the facts in the instant case bring it within the rule announced in *Bahnsen* v. *Walker*, 89 Okl. 143, 214 P. 832. It is there said: 'An oral contract made between B. and W., by which the latter agreed to use his influence to induce a third person to convey a tract of land to B., in consideration of which B. agreed to reconvey 20 acres of said tract to W., is not specifically enforceable in a suit in equity by W., upon the theory that the transaction was a joint adventure and the contract created a trust relation between B. and W.'
>
> In that case plaintiff was employed by defendant to use his influence to induce a third person to convey a tract of land to defendant, and, in consideration of such service, defendant agreed to convey to plaintiff 20 acres of the land. It was there contended, as in the instant case, that the transaction was a joint adventure, and not an oral agreement to convey an interest in the land. In disposing of this contention, the court said: 'We are unable to perceive any of the elements of a joint adventure or a trust relation in the transaction established by the foregoing uncontradicted evidence. It seems quite clear to us that at most the relation created by the contract was that of debtor and creditor, and that the refusal of the defendant to convey the land merely made the plaintiff his creditor.'
>
> In the instant case, defendants were the owners in fee of the land. They employed plaintiff to perform certain services for them and in consideration thereof agreed to give him an interest in the well and to convey to him an interest in the minerals. This case, insofar

> as it relates to an interest in the minerals lying in and under the land, under the above authority, is an agreement to convey an interest in the land, and cannot be construed as a joint adventure."

It is submitted that the decisions below conflict with the decisions cited in this section of our Petition.

(G) Respondent Having Abandoned and Renounced the Alleged Joint Adventure May Not under the Statutes of Oklahoma Recover Profits Earned by the Enterprise Subsequent Thereto.

Respondent Baker testified that he voluntarily resigned from the arrangement he had with Kasishke on June 5, 1939. In fact, he wrote a written letter of resignation (R. 33). The District Court found that Baker, by his act of resignation, terminated the alleged joint adventure (R. 70). The District Court also found that the leases were not paid out on that date (R. 70). Notwithstanding this situation, the District Court entered a judgment compelling the execution of assignments of a one-tenth interest, and also found that respondent was entitled to share in one-tenth of the profits of the venture for all time to come (R. 84). And this irrespective of the fact that no accounting has been had to determine if the leases have paid out and earned profits. Baker keeps his interest even though an accounting might show no profits from the business.

Under Oklahoma law, a joint adventure is governed by the law of partnerships and is in fact a partnership. Thus, in *Boles* v. *Aker*, 116 Okl. 266, 244 Pac. 182, 184, the Supreme Court of Oklahoma held (p. 184):

> "A joint adventure is governed by the same rules as partnerships, and in fact, is a partnership."

Thus, the law of Oklahoma is that when it is established that joint venture has been entered into, the law of partnerships applies.

Commercial Lumber Co. v. *Nelson,* 181 Okl. 122, 72 P. (2d) 829, 830.

In the *Commercial Lumber Co.* case, the Supreme Court of Oklahoma held (p. 830):

> "When it is established that a joint adventure has been entered into, then the law of partnership applies between the parties and third persons."

Section 8116, Compiled Statutes, 1921, of Oklahoma, provides:

> "After a partner has given notice of his renunciation of the partnership, he cannot claim any of its subsequent profits and his co-partner may proceed to dissolve the partnership."

This statute bars the right of respondent to recover for profits arising subsequent to his resignation on June 5, 1939. Thus in *Curtin* v. *Moroney,* 117 Okl. 276, 246 Pac. 232, 235 the Supreme Court of Oklahoma construed the provisions of Section 8116 of the Compiled Statutes and held (p. 235):

> "The court, applying the law to these facts, held that plaintiff was not entitled to any profits made after he withdrew from the partnership. Plaintiff contends that this was an error, and calls our attention to the rule stated in *Durbin* v. *Barber,* 14 Ohio 311, Bates on Partnership, Vol. 11, Sec. 794, p. 842, and 30 Cyc., p. 688, to the effect that, if a court of equity fix upon the time at which a partnership shall be considered as having determined, and it appear that the capital of one partner was subsequently employed by another, who continued to carry on the business, the former is entitled to such proportion of the profits as his capital thus retained bears to the whole capital. We think this is the general rule, and, in the absence of any statutory provisions to the contrary, is supported by the great

weight of authority, *but the rule is not applicable to the facts of the case at bar in this state because we have a statute to the contrary.* Section 8116, Compiled Statutes 1921, provides:

> 'After a partner has given notice of his renunciation of the partnership, he cannot claim any of its subsequent profits, and his copartners may proceed to dissolve the partnership.'

This statute settles the question involved against plaintiff's contention, and we must therefore hold that plaintiff was not entitled to judgment for profits under the facts as above stated." (Italics supplied.)

It seems perfectly plain that the provisions of the judgment entered below awarding respondent a one-tenth interest in properties of petitioner corporations and in awarding him one-tenth of the profits of the venture for all time to come squarely conflict with Section 8116 of the Compiled Statutes of Oklahoma and with the *Curtin* case.

II

The Decisions Below Are in Conflict With the Applicable Decisions of This Court

In *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, this Court overruled the ancient rule of *Swift* v. *Tyson*, 16 Pet. 1, and held that henceforth in all cases arising under state law, the law to be applied is the law of the state, and it makes no difference whether the law of the state shall be declared by its legislature in a state or by its highest court in a decision. This Court went further and declared that there is no Federal general common law and the federal courts have no power to declare substantive rules of common law applicable in a State whether they be local in their nature or general. In the instant case, we have demonstrated that the decisions below have refused to follow the law of Okla-

homa as declared in its statutes and by the decisions of its highest court.

In such a situation, it is plain that the decisions below conflict with the rule announced by this Court in the *Erie R. Co.* case and the numerous cases following it which have since been decided by this Court.[9]

In affirming the judgment of the District Court, the Court of Appeals below has therefore sanctioned such a departure from the usual course of judicial proceedings as now controlled by the *Erie R. Co.* case as to call for the exercise of this Court's powers of supervision and correction in the public interest.

It is also important to point out that the judgment below actually decrees specific performance of the alleged partnership contract here involved. It makes respondent a partner, with a one-tenth interest, with petitioners for all time to come. Specific performance of a partnership agreement of the character here found will not lie because partnerships not limited in term are terminable at will and involve personal services. This rule is of universal application, as this Court held in *Karrick* v. *Hannaman*, 168 U. S. 328, 333, 334, 336. While the courts below cite the *Karrick* case, their decisions permitting specific performance here conflict with that case.

While the manifest injustice visited upon petitioners by the judgment below might not cause this Court to grant Certiorari, as the decisions below squarely conflict with the controlling statutes and decisions of the State of Oklahoma, and the applicable decisions of this Court, it is against the public interest to permit those decisions to stand, as they will cause untold confusion and hardships and

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[9] Such as: *Meredith* v. *Winter Haven*, 320 U. S. 228, 237; *Palmer* v. *Hoffman*, 318 U. S. 109, 117; *Klaxton Co.* v. *Stentor Co.*, 313 U. S. 487, 496; *Griffin* v. *McCoach*, 313 U. S. 498, 503; *Fashion Guild* v. *Trade Comm'n.*, 312 U. S. 457, 468.

will be the incentive for a flood of litigation, particularly in the federal courts, by employees seeking to establish joint adventures through oral promises which do not comply with the established law of Oklahoma. As such suits could not be maintained in the Oklahoma courts because of the statutes and decisions noted, it is against the public interest to permit them to be maintained in the federal courts through a relaxation of the strict state rules controlling such adventures.

Conclusion.

It is respectfully submitted that this Petition for Certiorari to bring before this Court the decision and judgment of the United States Circuit Court of Appeals for the Tenth Circuit should be granted.

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April 6, 1945.

(7282)

(23)

No. 1117

In the Supreme Court of the United States

October Term, 1944.

A. H. KASISHKE, CORALENA OIL COMPANY, A DELAWARE CORPORATION, AND OLIVE DRILLING COMPANY, AN OKLAHOMA CORPORATION,
Petitioners,
vs.
B. A. BAKER, *Respondent.*

RESPONSE TO PETITION FOR A WRIT OF *CERTIORARI* TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

CONN LINN,
PAT MALLOY, JR.,
M. A. BRECKINRIDGE,
Attorneys for Respondent.

April 24, 1945.

TABLE OF CASES.

TABLE OF CASES—Continued.

STATUTES.

In the

SUPREME COURT OF THE UNITED STATES.

October Term, 1944.

No. 1117

A. H. KASISHKE, CORALENA OIL COMPANY, A DELAWARE CORPORATION, AND OLIVE DRILLING COMPANY, AN OKLAHOMA CORPORATION,

Petitioners,

vs.

B. A. BAKER, *Respondent.*

RESPONSE TO PETITION FOR A WRIT OF *CERTIORARI* TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

Respondent B. A. Baker would respectfully draw to the attention of the court that the petition is devoid of any valid grounds or reasons for the issuance of the writ of *certiorari.*

The petition raises no federal question of any kind or character; it raises no question of conflict of circuits; it raises no question of a general public nature such as would impel this court to exercise its discretion by the granting of the writ. It sets forth no clear conflict between the Circuit Court opinion and any decisions from the Supreme Court of Oklahoma. It sets forth no applicable statute of Oklahoma ignored or violated. It presents a simple suit in equity between private parties; it makes no claim that the judgment is inequitable; it makes no claim that any substantial

rights of the petitioners have been invaded. They virtually admit that the writ should not issue. They pray that this court issue the writ because:

> "It is against the public interest to permit those decisions to stand, as they will cause untold confusion and hardships and will be the incentive for a flood of litigation, particularly in the federal courts, by employees seeking to establish joint adventures through oral promises which do not comply with the established law of Oklahoma." (Pet. 32, 33.)

In other words, they are seeking to invoke the jurisdiction of this court to hear and determine moot or academic questions in which they have no present interest.

From pages 2 through 9 will be found what petitioners claim a "Summary Statement." This statement is shot through with errors of omission and commission. We do not make a counter statement for the sake of brevity, contenting ourselves with the invitation to the court to examine very carefully the findings of fact and conclusions of law made and entered by the trial court and affirmed by the Circuit Court of Appeals. All challenge to these findings of fact was abandoned in the brief and oral argument in the Circuit Court of Appeals, precluding any challenge against them here as is artfully attempted. A comparison of the statements made by petitioners with the findings of fact made by the trial court will disclose many contradictions. On pages 2 and 3 petitioners greatly magnify the importance of the lower court's decision as it affects the oil industry, especially respecting the oil business in the future. They speak specifically of Oklahoma, Kansas and New Mexico and they would have this court lay down for the Tenth Circuit a binding, uniform system regarding joint adventures,

and at the same time they denounce the Circuit Court's opinion because it is in flagrant violation of the *Tompkins* case which requires, of course, that the Circuit Court of Appeals shall follow the decisions of the respective states, rather than this Court's.

Let us say, had the case been of the importance suggested in the petition, the judges who sat and decided the case in the Circuit Court of Appeals would have sensed and corrected it more quickly than anyone, as Judge BRATTON who presided, is from New Mexico, a former United States Senator and former member of the Supreme Court of that state. Judge HUXMAN was one time governor of the State of Kansas and a distinguished, life-long member of the bar of that state, and Judge MURRAH, a distinguished practicing lawyer of Oklahoma prior to his appointment, first to the United States District Judgeship and then to the Circuit Court of Appeals.

—*MacGregor* v. *State Mutual Life Ins. Co.*, 315 U. S. 280, 62 Sup. Ct. 607, 86 L. ed. 486:

No amount of words or phrases on petitioners' part can magnify this case into one of public interest. It is too well understood by bench and bar that joint adventures are peculiarly dependent upon the facts of the particular case. It is the most informal agreement known to the law. It may be created by conduct alone; requires no writing; no express contract. A decision in one case is of practically no importance as a precedent in another. Oklahoma, Kansas, all of the States of the Union that have had anything to say about it have so held. The Circuit Court opinion covers this question very concisely.

As we heretofore have stated, there is no complaint made that on the merits petitioners have been injured. They

did not challenge any of the findings of fact of the trial court in the Circuit Court of Appeals. Respondent, therefore, came to that court with all the equities in his possession while petitioners came empty handed. In the Circuit Court of Appeals as here it developed into a contest between equity and technicalities. It is needless to say that the Circuit Court of Appeals wiped aside the technicalities in favor of justice and equity. Petitioners' main contention is based upon the theory that the court erroneously held that the status of the parties was that of joint adventurers. In our opinion, it makes no difference whether the technical definition or the status of the parties was that of joint adventure as in all events it was of a fiduciary character requiring the rights, remedies and relief to be determined by those principles of equity peculiarly applicable to fiduciary relationships. In respondent's judgment, it makes no difference whether the relationship was purely one by operation of law, joint adventure, mining partnership or partnership, the relief in equity had to be the same.

Here, let us refer to the conceded facts as disclosed by the record:

In 1928 petitioner Kasishke employed this respondent as a bookkeeper; within 2 years he was elevated to secretary-treasurer and drawing close to $2,000.00 per month. Petitioner Kasishke and respondent from then on became the very closest friends, socially and in a business way. Kasishke by reason of his age—being ten years older, his money and the very fatherly treatment accorded respondent, was the dominant personality. So that in 1932 when the agreement herein was made, at least so far as respondent is concerned, there could not have been any agreement made

between them at arm's length. Any agreement would have been conceived and born in the most intimate fiduciary relationship. Then when respondent permitted the titles of the leases which they were to and did acquire, to be taken in the name of A. H. Kasishke, Inc., or any *alter ego* of Kasishke, a trust by operation of law immediately sprang into being. Of this there can be no doubt, it was by the court below as a matter of fact so found and so held. Thereafter the rights, remedies and relief accorded to respondent would have been entirely controlled by those principles of equity pertaining to trusts by operation of law. In other words, the status of the parties was at least that of trustee and *cestui que trust.* And if it be conceded for the sake of argument that the courts below erroneously stated the status of the parties to be joint adventurers rather than trustee and *cestui que trust,* no substantial injury could possibly have been inflicted upon petitioners, as the relief in either event was identical. The fact is that in Oklahoma since territorial days to the present, joint adventures, where as here titles are taken in the name of one of the venturers only, are placed in the same category, so far as rights, remedies and relief are concerned, as constructive trusts. There is an unbroken line of cases on this subject.

—*Dike* v. *Martin,* 85 Okl. 103, 204 Pac. 1106;
Cassidy v. *Gould,* 86 Okl. 217, 208 Pac. 780;
Cassidy v. *Hornor,* 86 Okl. 220, 208 Pac. 775;
Blackstock Oil Co. v. *Caston,* 184 Okl. 489, 87 P. (2d) 1087;
Vilbig Construction Co. v. *Whitman,* (Okla., not yet officially reported) 152 P. (2d) 916.

If we should strike out all reference to joint adventure in this case it still would have to be held a constructive

trust, carrying with it the identical relief decreed by the judgment of the trial court. Thus the judgment is just and equitable, the securing of which is the goal of all courts of equity, and we respectfully submit that a just and equitable judgment should not be disturbed unless for the most cogent reasons, none of which appears here.

Respondent respectfully submits, therefore, that any reference to joint adventure in the case might be treated as surplusage or harmless error not affecting the substantial rights of the petitioners.

As we understand, the petitioners must show that they have been injuriously affected in their substantial rights by the decision of the lower court before they would be entitled to have the issuance of the writ of *certiorari*. The harmless error statute of Oklahoma is very similar to that in the federal jurisdiction.

McCabe & Steen Construction Co. v. *Wilson*, 52 L. ed. 971:

This court here quotes the Oklahoma statute:

> "The court in every stage of action must disregard any error, defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect."

In *Chenault* v. *Mauer*, 54 Okl. 651, 150 Pac. 507, it was held:

> "A decision of law reached by the wrongful application of a rule of law is harmless if the application of the correct rule of law would have cast an equal burden upon the adverse parties."

In *Nelson* v. *Davidson*, 45 Okl. 256, 145 Pac. 772, it is said:

"Where it does not appear that any errors complained of resulted in a *miscarriage* of justice the judgment will be affirmed under Rev. Laws 1910, Sec. 6005." (Italics ours.)

In *Palmer* v. *Hoffman*, 318 U. S. 109, 120, 87 L. ed. 646, this court held:

"Rulings of lower federal court applying local law will not be set aside by the Supreme Court except on a plain showing of error."

In *Securities & Exchange Commission* v. *Chenery Corp.*, 318 U. S. 78, 80, 87 L. ed. 626, this court gave the reason why this rule obtains:

"The reason for the rule that the decision of a lower court must be affirmed if the result is correct although the lower court relied upon a wrong ground or gave a wrong reason, is that it would be wasteful to send a case back to a lower court to reinstate a decision which it had already made but which the appellate court has concluded should properly be based on another ground within the power of the appellate court to formulate."

As we have shown, petitioners are seeking to protect the *future* interest of the oil industry, not complaining that so far as the merits are concerned in the instant case they have in any manner been injured. We therefore respectfully submit there is no good or valid reason why in this particular case the writ should issue as the judgment is correct on the unchallenged facts.

We shall now address ourselves to the contentions made by petitioners in the order in which they have presented them and we shall attempt, and think we shall demonstrate beyond question that the Circuit Court opinion is not in

conflict with any of the Oklahoma decisions relied upon by petitioners; that under the Oklahoma law the sharing of losses is not a necessary element in the creation of a joint adventure; that the lower courts were thoroughly justified under Oklahoma decisions in holding that the present case was one of joint adventure and that no statutes of Oklahoma were ignored or violated by the Circuit Court opinion.

Coming now to a consideration of the points made under Proposition I, we take up (A). Here petitioners say:

> "A joint adventure was not established because there was no agreement between the parties to share losses."

Petitioners intimate that the Circuit Court decision conflicts with Oklahoma decisions holding that the sharing of losses is a necessary element of joint adventure, relying largely upon *White* v. *A. C. Houston Lumber Co.*, 179 Okl. 89, 64 P. (2d) 908, 910. We quote a part of the holding therein:

> "*(1)* There must be joint interest in the property by the parties sought to be held as partners; *(2)* there must be agreements, express or implied, to share in the profits and losses of the venture and *(3)* there must be actions and conduct showing cooperation in the project."

Now let us examine the Circuit Court opinion to see if there is any conflict. We quote from the eighth paragraph of the syllabus of this case to be found in 146 F. (2d) 113:

> "There must be joint interest in property, agreement to share in profits and losses from venture and action and conduct showing cooperation in the property to constitute a 'joint adventure' which is more limited in its scope of operation than a partnership."

For authority what, if any, decision does the Circuit Court cite? *White* v. *A. C. Houston Lumber Co., supra!* The language in the Oklahoma decision is almost word for word that used by the Circuit Court of Appeals. If this is conflict, let them make the most of it. Now the Circuit Court said:

> "In determining whether one shares in the losses, the fact that one works for a nominal salary, thus losing a part of the value of his services will be taken into account."

This particular question never has been passed upon in any case by the Supreme Court of Oklahoma and therefore cannot produce any conflict.

With respect to the statement of nominal salary the record will disclose that respondent had received as much as $2,000.00 a month from petitioner Kasishke in another line of business but here he received but $150.00 a month to begin with and although the properties had become worth probably six million dollars, respondent's salary was never more than $300.00 a month. (See Finding of Fact VII, pp. 60, 62, Tr.) Petitioners say, however, that because the court made the parenthetical statement:

> "It has been held that it is not absolutely necessary that there be participation in both profits and losses,"

the court intended to hold such to be the law. This statement by the court which was taken from the leading case in Oklahoma of *E. D. Bedwell Coal Co.* v. *State Industrial Comm.*, 11 P. (2d) 527, in our judgment, cannot by any stretch of the imagination be tortured into any such holding. We shall have something more to say about the *Bedwell* case later.

It is claimed that since the *White* case the decision in the *Bedwell* case, *supra,* has been superseded (Pet. 16), and they further claim that since the *White* case *all* cases in Oklahoma have followed the rule laid down in that case. They contend that in the latest case of *Conley Drilling Co.* v. *Rogers,* 191 Okl. 667, 132 P. (2d) 959, it "squarely holds that it is essential to the existence of a joint adventure that the parties agree to share losses." And as a substantiation of that claim at the top of page 16 of the petition they claim to quote from the third paragraph of the syllabus, as follows

> "Generally before a mining partnership can exist, there must be a joint interest in the property, an agreement express or implied to develop it, and to share in the profits and losses incident to the venture, and conduct showing a cooperation between the parties in the venture."

Now let us examine these claims. *First,* as to the statement that all cases since the *White-Houston* case have followed it superseding the holding in the *E. D. Bedwell* case. The *White* case is reported in *64* P. (2d). In *Commercial Lumber Co.* v. *Nelson,* also cited by petitioners, 181 Okl. 122, *72* P. (2d) 829, decided a few months after the *White* case, and in *Sand Springs Home* v. *Dail,* 187 Okl. 431, 103 P. (2d) 524, erroneously cited by petitioners as 103 P., leaving out the (2d), cited also in petitioner's brief, the *E. D. Bedwell* case was followed rather than the *White-Houston* case. In *Commercial Lumber Co.* v. *Nelson, supra,* it is said:

> "As pointed out in the case of *E. D. Bedwell Coal Co.* v. *State Industrial Commission, supra,* a profit jointly sought in a single transaction by parties thereto is the *chief* characteristic of a joint adventure." (Italics ours.)

The *Sand Springs Home* case was decided more than three years after the *White* case. In that case the Supreme Court of Oklahoma quotes with approval the following from the *E. D. Bedwell Coal Company* case as follows:

> "Joint adventures being special combinations of two or more persons where, in some specific venture, a profit is jointly sought without any actual partnership designation, there is no reason why the parties by special agreement could not limit their respective profits and provide by their specific contract which particular part of the expenses each party should bear before participating in any profits."

It is evident that the word "expenses" was meant to include losses, as in the *Bedwell* case it is said:

> "It is next asserted that there must be a participation in both profits and losses. Again the assertion is too broad. Many cases might be cited where a joint adventure was held to exist when one of the parties, while entitled to share in the profits, if any, was not obligated for any loss. *Warwick* v. *Stockton*, 55 N. J. Eq. 61, 36 A. 488; *Reid* v. *Shaffer*, (C. C. A.) 249 F. 553.
>
> "It would appear from the above authorities that the agreement to share losses, if any, is not essential, the rate or ratio in which each shall share in the profits of a joint adventure may be fixed by the special contract."

Now coming to the *Conley* case, *supra*, which petitioners state "squarely" holds that it is essential to the existence of a joint adventure that the parties agree to share losses, let us see if this is true. Turning to the body of the opinion it will be found that appellant there contended that there is no joint adventure because all the requirements set forth in the *White* case were not present. However, the Supreme Court held that they were and therefore decided

the case upon the assumption that if the requirements therein stated were necessary as contended for by appellants, still the case was one of joint adventure. The court therefore was not called upon to determine squarely whether the sharing of losses was a necessary element.

Petitioners quote what they say is the third paragraph of the syllabus. The third paragraph of the syllabus in our copy of the official reports is as follows:

> "An assignment that the court erred in admitting evidence without specifically pointing out the evidence objected to is too indefinite to require consideration by this court."

However, in paragraph 2 of the syllabus from the official Oklahoma reports it is held:

> "In an action brought to hold parties liable as mining partners where there is evidence of a joint interest in the mining property and of an express or implied agreement to share in the profits and losses of the venture and conduct showing cooperation in the project between the parties there is sufficient evidence to base a finding of a mining partnership."

The difference between the language of the third paragraph of the syllabus as petitioners cite it and the second paragraph of the syllabus taken from the Oklahoma reports is so obvious that further comment is unnecessary.

That there is no crystalized system as contended for by petitioners, formulated by the Supreme Court of Oklahoma in 1937, is clearly established by the decision in the *Sand Springs Home* case decided more than three years thereafter. Petitioners claim that in 1937 the Supreme Court established a crystalized system respecting the essentials of a joint adventure and they say this was done by the Supreme

Court in the *White-Houston* case. Now let us examine that case for a moment. The chief and deciding point in that case was whether there was such joint interest between the parties as is necessary to constitute a joint adventure. In our judgment, the court answered that question clearly by saying there was none and that effectually settled the entire lawsuit. What was said respecting a generalized rule as to the elements of joint adventure was wholly uncalled for. The question of the necessity of sharing losses was not necessarily involved. Moreover, the opinion was not written by any member of the Supreme Court of Oklahoma, it was what is known in Oklahoma now as a "farmed out" case, to three lawyers of the Tulsa Bar, one of whom wrote the opinion which was concurred in by the other two. This opinion and record were then sent back to the Clerk of the Supreme Court and thereafter one member of the court examined the opinion prepared by the Tulsa lawyers and recommended that it should be adopted by the whole court. This practice was an expedient of doubtful benefit as later results have shown, adopted by the court to relieve a very much congested docket. (See last paragraph of the case.) Results were the main thing sought. This committee of lawyers, as so often is the case with men who have had no prior judicial experience, did not stop when they had decided the vital points therein but tried to cover the entire law of joint adventure. It is evident that they were not fully advised as to the law in Oklahoma inasmuch as they did not refer to the following statutes from Oklahoma, Chap. 1, Title 54, Sec. 1, Okla. Stats. Ann.:

> "Partnership is the association of two or more persons for the purpose of carrying on business together, and dividing its profits between them."

And Sec. 6 of the same title which provides as follows:

> "An agreement to divide the profits of a business implies an agreement for a corresponding division of its losses, unless it is otherwise expressly stipulated."

And *Foster* v. *Wilkinson*, 96 Okl. 110, 220 Pac. 325, construing this statute in which it is said, among other things:

> "In other words it should appear from the evidence that it was the intention of the parties that they were entering into an association for carrying on business together and sharing the profits, which implies an agreement to divide the losses unless otherwise agreed."

They did not cite nor refer to *Municipal Pav. Co.* v. *Herring*, 50 Okl. 470, 150 P. 1067, so heavily relied upon by petitioners, which holds that one of the distinctions between joint adventures and partnership is that in the former there is no necessity for a contract, express or implied, for the sharing of losses. They did not refer to nor in anywise criticize the *E. D. Bedwell* case, *supra*, which at that time was the most recent expression of our Supreme Court, a case in which the question was squarely raised and squarely passed upon by our Supreme Court. We submit that there is no probability of our Supreme Court upholding *White* v. *A. C. Houston Lumber Co.*, when the statutes and these other decisions, including *Sand Springs Home* v. *Dail*, *supra*, decided more than three years after the *White* case are brought to the attention of the court. We therefore respectfully submit that there is no merit in petitioners' contention under (A) of Proposition I, *first*, because the Circuit court opinion instead of conflicting, follows *White* v. *A. C. Houston Lumber Co.* *Secondly*, because the true rule in all probability in Oklahoma will be that announced in *E. D. Bedwell Coal Co.*

v. *State Industrial Comm.*, and affirmed in the *Sand Springs Home* case.

This further thought: Because in the *White* case the statutes and other decisions hereinabove cited were not referred to or in any manner modified, they will be taken as the true rule in Oklahoma rather than *White* v. *Houston Lumber Co.* See Sections 1 and 2 of the syllabus in *Grand Trunk Western R. Co.* v. *H. W. Nelson Co.*, 118 F. (2d) 252.

On pages 18 and 19 petitioners claim that respondent had no present interest in the properties and therefore there could be no joint adventure. This statement is squarely in the teeth of the findings of fact of the trial court and the holding in the Circuit Court of Appeals. And inasmuch as the question whether a joint adventure *in praesenti* or *in futuro* was one of fact decided in respondent's favor, and the further fact that no challenge to this finding of fact was made in the Circuit Court of Appeals, we do not take up further time answering it.

Responding to (C):

> "Respondent failed to establish a joint adventure because the evidence showed that he had no equal right of management,"

we call attention to the fact that petitioners rely mainly upon *Municipal Paving Co.* v. *Herring, supra,* why, we are at a loss to understand, because in that case the court held the status of the parties to be joint adventurers rather than partners because there one of the parties had no equal right of management with the others. Just as we cannot understand why they cite this same case to the point that the sharing of losses is a necessary element in order to constitute a joint adventure, as in that case the court specifically holds

to the contrary on both points. This case has been cited since as an authority on joint adventure by the Supreme Court of Oklahoma in two cases:

Twyford v. *Sonken-Galamba Corp.*, 177 Okl. 486, 60 P. (2d) 1050;

Sand Springs Home v. *Dail*, 187 Okl. 431, 103 P. (2d) 524.

In the following cases from Oklahoma upheld as joint adventures, the management was confided to one of the joint adventurers to the exclusion of the others:

Twyford v. *Sonken-Galamba Corp., supra*;

Sand Springs Home v. *Dail, supra;*

E. D. Bedwell Coal Co. v. *State Industrial Comm. supra;*

Vilbig Construction Co. v. *Whitman*, 152 P. (2d) 916;

Blackstock Oil Co. v. *Caston*, 184 Okl. 489, 87 P. (2d) 1087.

We cite these in addition to the cases cited by the Circuit Court of Appeals. We take the following from the 5th paragraph of the syllabus prepared by the West Publishing Company in the *Sonken-Galamba*, case, *supra:*

> "Joint adventurer held authorized to grant exclusive possession and right of liquidation of property belonging to joint adventurers as tenants in common to coadventurer."

Under (D), petitioners contend:

> "A joint adventure must be limited to a specific venture."

This question is completely answered by the opinion in the Circuit Court of Appeals.

Under (D) petitioners say:

> "The Supreme Court of Oklahoma has held many times that a joint adventure is a special combination of two or more persons seeking jointly, without any actual partnership or corporate designation, a profit in some specific venture."

Attached is a footnote numbered 5, in which it is said:

> "As respondent conceded that the 'venture' was to be conducted *as a corporation*, it could not be a joint adventure."

First, we did not concede that it was being run as a corporation but through a corporation, but this makes no substantial difference. It will be noted that petitioners cite no authority in support of their statement that under such circumstances it could not be a joint adventure. Moreover, the latest Oklahoma Supreme Court definition of a joint adventure, so far as we have been able to gather, is contained in *Vilbig Construction Co.* v. *Whitman, supra,* as follows:

> "A joint adventure is a special combination of two or more persons whether corporation, individual or otherwise, where in some specific venture a profit is jointly sought without the necessity of any actual partnership or corporate designation."

Which is a very different definition from that contained on page 22 of the petition.

With respect to the statement that a corporation may not be the vehicle through which a joint adventure is carried out, we cite the following cases from Oklahoma to the contrary:

Municipal Paving Co. v. *Herring, supra;*

E. D. Bedwell Coal Co. v. *State Industrial Comm., supra;*

Twyford v. *Sonken-Galamba Corp., supra;*
Blackstock Oil Co. v. *Caston, supra;*
Vilbig Construction Co. v. *Whitman, supra.*

Many others might be cited.

Under (E) the contention is made:

> "This is not a case in which the corporate entity may be disregarded."

Contrary to the findings of the lower court and the Circuit Court, petitioners attempt here to argue that Mrs. Kasiske was a bona fide stockholder in the corporation, which is all contrary to the record. The stock was given to her by her husband, usually for tax purposes. (See findings of fact.) Petitioner Kasishke juggled the stock as the exigency of the case suggested. The evidence discloses, and the lower court and the Circuit Court affirmed, that Mrs. Kasiske, like respondent Baker, signed her stock in blank and returned it to Kasishke. There is a deposition put in evidence by petitioners of one Earl Brown which so conclusively shows that it was a one-man corporation, owned and controlled by A. H. Kasishke, that further comment is unnecessary. (Tr. 121, 122, 284, 289)

It is stated at the bottom of page 23:

> "The record shows that Mrs. Kasishke participated in the affairs of the company as a director and as a stockholder."

Whereas the lower court found upon the uncontradicted testimony that no directors' or stockholders' meetings were held. Mrs. Kasishke stated that she did talk to her husband about business while riding along in the car or at home but she reluctantly admitted that she never attended any formal meetings of directors or stockholders. Petitioners in sup-

port of their contention cite the case of *State, ex rel.*, v. *Tulsa Flower Exchange*, 135 P. (2d) 46-47. It was never intended by this case to in any way modify the equitable doctrine of *alter ego*. The case went off on the word "control" as used in a provision of the State Employment Security Act. In the body of the opinion it is said:

> "The facts which allegedly make the two defendants a single employer are that the defendant Tinger as an individual owns the Sand Springs Greenhouse outright, and owns also 70 per cent of the capital stock of the Tulsa Flower Exchange, a corporation, and as such stockholder controls the corporation, which it is said makes the two defendants controlled * * * directly by the same interest within the meaning of said paragraph (4)."

Says the court:

> "It is shown, however, that the two businesses are operated separately and are related in no way, except Tinger controls the one outright and exercises control of the other as majority stockholder. Tinger is said to be the 'interest' which controls the two 'employing units by legally enforceable means or otherwise.'
>
> "According to said paragraph (4) the control of the separate units must be 'direct control,' or the immediate right to enforce the right to direct control, by the same 'interest' in order for the combined units to constitute a single 'employer' within the meaning of the statute."

It will be seen at once that the decision here in no way attempts to repudiate the universal doctrine in this country pertaining to *alter ego*. Indirect control is sufficient to support the *alter ego* doctrine.

It is stated in (F), (Pet. 26):

> "The alleged oral contract is unenforceable be-

cause of the provisions of the Oklahoma statute of uses and trusts and the statute of frauds."

Counsel's statements in the first paragraph thereunder are entirely incorrect. The record will disclose, contrary to petitioners' contention, that the defense of an oral express trust was not alleged in their pleadings by petitioners. It was not thought of until it reached the Circuit Court of Appeals. Express trusts and the statute of frauds must not be confused. The statute of frauds is found in Title 15, Sec. 136, Oklahoma Statutes 1941, whereas the statute of uses is found in Title 60, Sec. 136, Oklahoma Statutes 1941. The petitioners did set up the statute of frauds as a defense as well as the statute of limitations, but not a word with respect to the statute of uses. This was brought to the attention of the Circuit Court of Appeals by respondent. In our judgment, it could not have been raised for the first time in the Circuit Court of Appeals; furthermore, there is not one word of testimony in the record which justifies in the slightest the contention made by the petitioners here that it was an attempt to create an oral express trust. The testimony of respondent with respect to the agreement is set out in full in the petition. There is not a word in it referring to any person or corporation other than the respondent and the petitioner Kasishke. The properties were taken in the name of Kasishke's *alter ego* or nominee by tacit consent. There is not a word in this testimony that Kasishke or his nominee or the holder of the titles was to convey a single thing, much less oil and gas leases to respondent. In other words there is not a line indicating that Kasishke or the corporations his *alter egos* was to convey anything to Baker. The statute of frauds in such case has no application. The case is ruled in this respect by *Chowning* v. *Gra-*

ham, 74 Okl. 232, 178 Pac. 676. Furthermore, the statute of frauds does not apply in fiduciary relationships such as trusts by operation of law, joint adventures or co-partnership.

—*Dike* v. *Martin,* 85 Okl. 103, 204 Pac. 1106;
Cassidy v. *Gould,* 86 Okl. 217, 208 Pac. 780;
Blackstock Oil Co. v. *Caston, supra;*
Chowning v. *Graham, supra.*

A consideration of the cases cited on page 27 will show that the facts therein are not applicable here. For instance *McCoy* v. *McCoy,* 30 Okl. 379, 121 Pac. 176, and *Bryant* v. *Mahan,* 130 Okl. 67, 264 Pac. 811, therein cited, when properly read are authority for the contention that the present facts come within the rule as to constructive trusts. *McCoy* v. *McCoy* is cited on the subject by the leading case in Oklahoma of *Dike* v. *Martin, supra.*

On page 27 petitioners say:

> "If the oral agreement contended for by respondent does not constitute an attempt to create an oral express trust, nevertheless, under respondent's theory he was to receive a one-tenth interest in the leases in consideration for certain services. Such a contract has been squarely held by the Supreme Court of Oklahoma to be violative of the statute of frauds and unenforceable." (Citing *Hall* v. *Haer,* 160 Okl. 118, 16 P. (2d) 83.)

The facts in the *Hall* case clearly distinguish it from the case at bar: *First,* there was an entire absence of any trust relation. *Secondly,* the agreement to convey an interest in lands to plaintiff created the parties co-tenants rather than joint tenants. Here there is no agreement to have Kasishke or his *alter ego* convey to respondent anything. Respondent and petitioner Kasishke had the titles

taken in the name of another with no provision to convey or reconvey. The properties were to be developed for the joint interest of both. Only upon the termination of the venture should there be a conveyance, if any, and that by the rules of equity in such cases provided—certainly not by any specific agreement of the parties. Thus the case is ruled by *Chowning* v. *Graham, supra,* where the whole subject is treated, even to the point of partial performance. We call attention to the fact that in *Bahnsen* v. *Walker,* 89 Okl. 143, 214 Pac. 732, cited and relied upon in the *Hall* case, it is pointedly stated that no question of a trust nature obtained between the parties, so unlike the case here. That case did not hold that personal services were not sufficient consideration to create a joint adventure. The court, however, holding that no elements of a joint adventure were present, proceeded to discuss the personal services question. *Hall* v. *Haer* was by a divided court and in *Ross* v. *Holland,* 189 Okl. 428, 11 P. (2d) 798, has been seriously questioned.

It is contended in (G):

> "Respondent having abandoned and renounced the alleged joint adventure may not under the statutes of Oklahoma recover profits earned by the enterprise subsequent thereto."

As authority they cite Sec. 8116, Compiled Oklahoma Statutes 1921, which applies to a *renunciation* of partnership and they seem to intimate in their petition that this section was passed in order to systemitize and make clear and concise the rights of partners and joint adventurers in the oil business. The fact of the business is this statute was brought from the Dakotas to Oklahoma years prior to the discovery of a single drop of oil in this state.

Under this contention petitioners claim that the so-called letter of resignation of respondent was a renunciation of his interest in the venture. A copy of the letter will appear on page 33 of the record. We call attention to the very friendly spirit in which it is couched. It is not outright, unqualified resignation, as it says:

> "I think it best for me to *tender* my resignation knowing this is your wish." (Italics ours.)

The letter then says:

> "If there is anything that comes up just feel free to call on me and I shall be glad to either explain or assist you on same."

Here is a standing offer by respondent to continue to perform his part of the agreement. This letter was never answered by Kasishke. It seems absurd to us to try to torture this language into the renunciation meant by the statute. The trial court held and the Circuit Court of Appeals affirmed the finding of fact that this letter of offer of resignation was brought about by the sole fault of petitioner Kasishke and the Circuit Court said:

> "It would indeed be strange if one could use his own wrongful conduct to deprive another of his interest in a common enterprise."

We again refer to Finding of Fact XV (Tr. 64). On page 32 of the petition it is said:

> "It is also important to point out that the judgment below actually decrees specific performance of the alleged partnership contract here involved. It makes respondent a partner, with a one-tenth interest, with petitioners for all time to come. Specific performance of a partnership agreement of the character here found will not lie because partnerships not limited in term are terminable at will and involve personal services."

Contrary to petitioners' statement, the court did not decree specific performance of a partnership agreement but held that the partnership was dissolved as of the 5th day of June, 1939. In decreeing respondent a one-tenth interest in the properties it is but a distribution in equity of the partnership assets.

Before closing we desire to reply to a statement on page 29 which we quote:

> "And this irrespective of the fact that no accounting has been had to determine if the leases have paid out and earned profits. Baker keeps his interest even though an accounting might show no profits from the business."

The provisions of the judgment transferring Baker's interest in the properties at the expiration of sixty days was the suggestion of petitioners. They wanted a determination that the judgment was final before an accounting was had. Under agreement petitioners filed the transcript in the Circuit Court of Appeals immediately and under agreement respondent filed a motion to dismiss the appeal for want of finality. Petitioners appeared as the record will show, and strenuously argued that the judgment was final and succeeded in having the Circuit Court of Appeals so hold. They made no objection to the verbiage or phraseology of the judgment whatever. They briefed and argued the case in the Circuit Court of Appeals on the theory that it was final. The doctrine of invited error certainly applies here. As the language and the phraseology was written as a favor to them, as they did not desire to go through the process of an accounting until it was decided whether it was a final judgment, yet they were fearful that if they waited until after

an accounting to file their record on appeal they would be met with the objection that the appeal was filed too late.

Having considered the application of petitioners for a writ of *certiorari* we respectfully submit, *first*, that petitioners have wholly failed to state any valid reason in law or in equity why the writ of *certiorari* should issue. They have not shown that the judgment of the lower court is not just and equitable according to the merits of the case. They have not shown any real or fancied conflict between the Circuit Court decision and the decisions of the Supreme Court of Oklahoma, nor have they shown that any sections of the statutes of Oklahoma applicable to the case at bar have been ignored or violated.

It is respectfully submitted that no lawyer, nor those intending to engage in the oil business as joint adventurers can possibly be misled by the eighth paragraph of the syllabus in this case, nor will it bring about any confusion amongst bench and bar as it follows almost word for word the quotation from the case so heavily relied upon by petitioners of *White* v. *A. C. Houston Lumber Company, supra.*

We therefore respectfully submit that the writ of *certiorari* should be denied.

CONN LINN,
PAT MALLOY, JR.,
M. A. BRECKINRIDGE,
Attorneys for Respondent.

April 24, 1945.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 1117

A. H. KASISHKE, CORALENA OIL COMPANY, a Delaware Corporation, and OLIVE DRILLING COMPANY, an Oklahoma Corporation,

Petitioners,

vs.

B. A. BAKER,

Respondent

REPLY BRIEF FOR PETITIONERS

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PRESS OF JUDD & DETWEILER, INC., WASHINGTON, D. C.

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REPLY BRIEF FOR PETITIONERS

The Petition in a summary manner states the facts in this case. Respondent instead of pointing out any inaccuracies in the "Summary Statement," makes the bold statement (Response, p. 2) that it "is shot through with errors of omission and commission." Then respondent invites this Court to make a careful examination of the record to find these "many contradictions," without any indication of what they may be. Such a response is neither helpful nor fair to this Court, and actually leaves uncontradicted the statement of the case as set out in the Petition.

Respondent next engages in the strange argument (Response, p. 1) that no "substantial rights of petitioners have been invaded" and that petitioners are seeking to have this Court "determine moot or academic questions in which they have no present interest"! Of course, petitioners have an interest in this case. The judgment below awards a one-tenth interest to respondent in the petitioner corporations' monies and in certain leases valued in excess of six million dollars. As the mandate and judgment have been stayed, we fail to see how the case has become *moot* and *academic*.

But the argument is a curious emasculation of the Rules of this Court controlling Certiorari. Certiorari is granted in the public interest, not for the convenience of individual litigants, and our Petition alleges *several* of the reasons generally considered by this Court as the basis for the allowance of the Writ (Pet. pp. 13-33).

Respondent next attempts to twist our statements (Pet. pp. 2-3, 14, 32, 33) that the decisions below will have far-reaching effects, particularly in the Tenth Circuit, into a request for a "binding uniform system regarding joint adventures" in the Tenth Circuit, to control the law of "Oklahoma, Kansas and New Mexico" (Response, pp. 2, 3). We make no such request and are sure that this Court will not be misled by such tactics.

Next, respondent does a complete about-face and now takes the *new* position that it makes no difference whether "*the court below erroneously held that the status of the parties was that of joint adventure*" (Response, p. 4). And this for the purpose of arguing that the relief afforded can be sustained *on another ground* than the single ground of joint adventure upon which all the findings of fact, conclusions of law, and both decisions below are based.

This change of position is made in attempt to get some benefit out of such cases as *Dike* v. *Martin*, 85 Okl. 103, 204 Pac. 1106.[1] But those cases are inapplicable for the reason

that before they come into play you must *first establish a joint adventure*. If the joint adventure theory be *disregarded*, a rule based upon the existence of a joint adventure is clearly beside the point.

The judgment below can not be maintained on any theory of law except that of a joint adventure. Thus, if respondent pitches his case upon an agreement to create an express trust to obtain an interest in the leaseholds here involved, he runs head-on into the Oklahoma rule that such an agreement must be in writing.[2] No constructive trust or trust by operation of law can arise here, and no such contention has heretofore been made. The action of the courts below, in awarding respondent *an interest* in the leases of *petitioner corporations*, is based entirely *upon the existence of a joint adventure* between petitioner Kasishke and respondent.[3] The "alter ego" theory comes into play only as a *means* of reaching the assets of petitioner corporations, *once the joint adventure is established*. It adds nothing to respondent's *basic premise* and falls when that premise falls.

Respondent next seems to argue (Response, pp. 8, 9) that the court below did *not* hold that it is *not* necessary that there be participation in both profits *and losses*. This, so he can next argue as he does (Response, pp. 8, 9) that there is no conflict between the decisions below and *White* v. *A. C. Houston Lumber Co.*, 179 Okla. 89, 64 P. 2d 908, 910, and the cases following it. We submit, as respondent testified he was *not to share any losses*, that the decision below *must* hold a sharing of losses is *not* a necessary essential of a joint adventure, and it does so hold.[4]

Respondent's present evasiveness is understandable, as he is forced to concede (Response, p. 8) as he does, that the

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[1] Cited along with several other decisions on page 5 of the response.
[2] See Petition, pp. 26-29.
[3] R. 67, 68, 70; 146 F. 2d 114, 116.
[4] 146 F. 2d 115; R. 337.

White case holds that before a joint adventure can exist in Oklahoma there *must* be an agreement "to share in the profits *and losses.*" Respondent then plunges into a tirade (Response, pp. 13-15) against the *White* case, assumes the role of a prophet and prophesies (Response, p. 14) that the Supreme Court of Oklahoma will not "uphold" the *White* case in the future. We reply, until the Supreme Court of Oklahoma reverses the *White* case, it being years later than *E. D. Bedwell Coal Co.* v. *State Industrial Comm.*, 11 P. 2d 527,[5] the *White* case is the controlling law of Oklahoma and should have been followed.

Another "straw" argument appears on page 12 of the response. Respondent in discussing the most recent case on the subject, *Conley Drilling Co.* v. *Rogers*, 191 Okl. 667, 132 P. 2d 959, which approves and "*upholds*" the *White* case, states that the third paragraph of the syllabus, which we quote (Pet. p. 16), reads differently in respondent's copy of the report of the case. The Petition quotes the syllabus as it appears in 132 P. 2d 959 and specifically refers to page 959. The syllabus as quoted appears on the cited page and is fully supported by the text (p. 961) of the opinion.

The response (p. 9) seems to intimate that an agreement to share losses can be *presumed* here because respondent is said to have worked for a "nominal" salary. That rule is inapplicable here as it is conceded by respondent that it was agreed that he was *not* to share even "a dime of loss" (R. 145). There is no room for implication here because the contrary fact is established by an express agreement.

In discussing the statutes of uses and frauds, respondent (Response, pp. 20-22) argues they are inapplicable. But this argument is based *entirely* upon the premise that a *joint adventure was proven.* As we contend a joint adven-

[5] No Oklahoma decision has been found following the ruling as to losses of the *E. D. Bedwell Co.* case. All recent decisions instead follow the *White* case.

ture was *not* established under Oklahoma law, this whole argument falls of its own weight.

Respondent says (p. 22) Sec. 8116, Compiled Oklahoma Statutes, 1921, is inapplicable because respondent's written resignation (R. 33) is not "unqualified." Apparently respondent is now contending he did not renounce the arrangement. This is a novel argument. The trial court found that respondent did renounce and resign and that such resignation terminated the arrangement (R. 62, 65, 70). The argument that respondent was "justified" is irrelevant. The statute is absolute and it is not pitched on *cause*. A partner who renounces for any reason by the plain terms of the statute has no interest in future earnings. The judgment below clearly conflicts with the statute as the Petition shows (pp. 29-31).

Respondent's reply (p. 24) to our argument that specific performance has actually been decreed is specious. The judgment decrees performance and decrees the transfer of an interest in real estate. A more specific performance of the alleged partnership of joint adventure is difficult to comprehend.

Conclusion

In conclusion, we respectfully submit that the Petition for Certiorari should be granted.

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